

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 08, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT A.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-CV-03227-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 14. Attorney D. James Tree represents Robert A. (Plaintiff); Special Assistant United States Attorney Lisa Goldoftas represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

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JURISDICTION

Plaintiff filed an application for Supplemental Security Income on September 2, 2016, alleging disability beginning September 1, 2016 due to bilateral knee pain, neck pain, right shoulder pain, low back pain, and learning disabilities. Tr. 91-92. The application was denied initially and upon reconsideration. Tr. 113-17, 121-24. Administrative Law Judge (ALJ) C. Howard Prinsloo held a hearing on October 31, 2018, Tr. 58-90, and issued an unfavorable decision on December 4, 2018, Tr. 15-24. Plaintiff requested review by the Appeals Council and the Appeals Council denied the request on August 11, 2019. Tr. 1-5. The ALJ's December 2018 decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on September 23, 2019. ECF No. 1.

STATEMENT OF FACTS

Plaintiff was born in 1971 and was 44 years old as of the filing of his application. Tr. 22. He has a high school diploma and has worked as a bowling alley technician, bakery worker, fruit packer, and cashier. Tr. 76-80, 83-84, 409. He last worked in 2006 and stopped working due to pain. Tr. 81.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a

1 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
2 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
3 rational interpretation, the Court may not substitute its judgment for that of the
4 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
5 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
6 administrative findings, or if conflicting evidence supports a finding of either
7 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
8 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
9 supported by substantial evidence will be set aside if the proper legal standards
10 were not applied in weighing the evidence and making the decision. *Browner v.*
11 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

12 **SEQUENTIAL EVALUATION PROCESS**

13 The Commissioner has established a five-step sequential evaluation process
14 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
15 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
16 proof rests upon the claimant to establish a prima facie case of entitlement to
17 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
18 claimant establishes that a physical or mental impairment prevents the claimant
19 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant
20 cannot perform past relevant work, the ALJ proceeds to step five, and the burden
21 shifts to the Commissioner to show (1) the claimant can make an adjustment to
22 other work; and (2) the claimant can perform specific jobs that exist in the national
23 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir.
24 2004). If a claimant cannot make an adjustment to other work in the national
25 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

26 **ADMINISTRATIVE DECISION**

27 On December 4, 2018, the ALJ issued a decision finding Plaintiff was not
28 disabled as defined in the Social Security Act.

1 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
2 activity since the application date. Tr. 17.

3 At step two, the ALJ determined Plaintiff had the following severe
4 impairments: degenerative joint disease of both knees and the left shoulder,
5 degenerative disc disease of the lumbar spine, and obesity. *Id.*

6 At step three, the ALJ found Plaintiff did not have an impairment or
7 combination of impairments that met or medically equaled the severity of one of
8 the listed impairments. Tr. 18.

9 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
10 he could perform medium exertional work, except "he can occasionally reach
11 overhead with his left shoulder; he can never climb ladders, ropes, or scaffolds."
12 *Id.*

13 At step four, the ALJ found Plaintiff was unable to perform any past relevant
14 work. Tr. 22.

15 At step five, the ALJ determined that, based on the testimony of the
16 vocational expert, and considering Plaintiff's age, education, work experience, and
17 RFC, Plaintiff was capable of performing jobs that existed in significant numbers
18 in the national economy, including the jobs of press operator, hand packager, and
19 production assembler. Tr. 22-23.

20 The ALJ thus concluded Plaintiff was not under a disability within the
21 meaning of the Social Security Act at any time from the application date through
22 the date of the decision. Tr. 23.

23 ISSUES

24 The question presented is whether substantial evidence supports the ALJ's
25 decision denying benefits and, if so, whether that decision is based on proper legal
26 standards.

27 Plaintiff contends the ALJ erred by (1) improperly rejecting Plaintiff's
28 symptom testimony; and (2) improperly evaluating the medical opinion evidence.

DISCUSSION

1. Plaintiff's symptom statements

Plaintiff alleges the ALJ erred in rejecting his symptom testimony without providing adequate reasons. ECF No. 13 at 4-15.

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting a claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

The ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, he found Plaintiff's statements concerning the intensity, persistence and limiting effects of his symptoms were not entirely consistent with the medical evidence and other evidence in the record. Tr. 19. Specifically, the ALJ found the record reflected mostly unremarkable findings, Plaintiff received conservative treatment, and Plaintiff performed a number of physical activities that suggested he was not as limited as alleged. Tr. 19-20.

a. Conservative Treatment

The ALJ found Plaintiff's course of treatment was largely conservative, consisting of over-the-counter medications and non-operative treatments. Tr. 20. The ALJ further noted Plaintiff reported improvement to his shoulder with physical therapy, and that his pain was eased through hot showers, rest, and the use of a knee brace. *Id.*

Plaintiff argues the ALJ failed to consider the reasons Plaintiff did not receive more treatment, as required by Social Security Ruling 16-3p. ECF No. 13 at 10-11. He argues the record shows he did not have insurance for many years,

1 and having just started receiving treatment, was exhausting conservative treatments
2 prior to moving to more aggressive measures. *Id.* He further notes that access to
3 care was impeded, including being on waiting lists and his insurance denying
4 certain treatments. *Id.* Defendant argues the record contains no evidence that
5 Plaintiff's problems ever progressed to the point of needing more aggressive kinds
6 of treatment and the ALJ reasonably considered the conservative measures. ECF
7 No. 14 at 7-8.

8 The Court finds the ALJ did not err. The Ninth Circuit has held that
9 "evidence of 'conservative treatment' is sufficient to discount a claimant's
10 testimony regarding severity of an impairment." *Parra v. Astrue*, 481 F.3d 742,
11 750-51 (9th Cir. 2007) (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.
12 1995)). The ALJ reasonably interpreted the record as consisting primarily of over-
13 the-counter medications and recommendations for conservative treatments such as
14 physical therapy, chiropractic care, massage, and weight loss. At a consult with
15 Lakeview Spine, Plaintiff was told he could get an epidural injection "if he is ever
16 in protracted pain," (tr. 497) but at the hearing he testified he had never received
17 injections. Tr. 81. The spine consultant indicated he wanted to try more
18 conservative measures, such as chiropractic, massage, and acupuncture. Tr. 497.
19 The ALJ's interpretation of the record is supported by substantial evidence.

20 Plaintiff's arguments regarding access to care, while factually correct, do not
21 invalidate the ALJ's rationale. Social Security Ruling 16-3p requires an ALJ to
22 consider possible explanations for a claimant's failure to seek treatment; however,
23 the ALJ did not discount Plaintiff's allegations based on a failure to seek treatment.
24 Rather, the ALJ found the treatment recommended was conservative, and thus
25 indicated the problems were not as bad as alleged. Tr. 20. Plaintiff's argument that
26 conservative measures needed to be exhausted before more aggressive treatments
27 were recommended is undermined by the records that indicate no objective basis
28 for surgical intervention and that opiates should be avoided "at all cost." Tr. 424,

1 428, 496. The ALJ did not err in failing to discuss the reasons why Plaintiff did not
2 seek more care.

3 *b. Objective evidence*

4 The ALJ found Plaintiff's statements about his symptoms were inconsistent
5 with the objective medical evidence, noting that while he occasionally
6 demonstrated reduced range of motion and tenderness on exam, his exams were at
7 other times intact and generally normal in many areas. Tr. 19-20.

8 Plaintiff argues the objective findings that were abnormal support his
9 allegations, and that the normal exam findings do not negate the times when there
10 was objective support of his conditions, particularly given the circumstances of his
11 intermittent flares of pain. ECF No. 13 at 11-15. Defendant argues the ALJ's
12 interpretation is supported by substantial evidence, and the frequently
13 unremarkable findings undermine Plaintiff's allegations. ECF No. 14 at 5-6.

14 Although it cannot serve as the sole ground for rejecting a claimant's
15 symptom statements, objective medical evidence is a "relevant factor in
16 determining the severity of the claimant's pain and its disabling effects." *Rollins v.*
17 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The Court finds the ALJ reasonably
18 interpreted the record as lacking objective findings supportive of the extent of
19 Plaintiff's allegations, pointing to normal findings throughout the record. Tr. 19-
20 20. In discussing the opinion evidence, the ALJ also noted Plaintiff's treating
21 doctor's comment that Plaintiff "reports more pain than would be expected from
22 his imaging results and physical exam findings." Tr. 21 (citing Tr. 400). The ALJ's
23 interpretation of the record is supported by substantial evidence.

24 *c. Daily activities*

25 A claimant's daily activities may support an adverse credibility finding if the
26 activities contradict his other testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.
27 2007). The ALJ noted Plaintiff was able to engage in regular household chores, do
28 yard work, go swimming, take his girlfriend out for dates, and babysit his sister's

1 children. Tr. 20. The ALJ found these activities did not appear entirely consistent
2 with Plaintiff's allegations of disabling limitations and that he regularly stayed in
3 bed due to pain. *Id.*

4 The Court finds the activities identified by the ALJ are not inconsistent with
5 Plaintiff's allegations. He testified that he is only able to engage in chores
6 sporadically on good days and has to take breaks after 45-60 minutes of activity.
7 Tr. 69-70. His babysitting activity occurred years before the alleged onset date,
8 and therefore has no bearing on his disability status as of 2016. Tr. 71-73.

9 However, because the ALJ provided other clear and convincing reasons for
10 discounting Plaintiff's allegations, any such error was harmless. *Batson v. Comm'r*
11 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming a credibility
12 finding where one of several reasons was unsupported by the record).

13 **2. Medical opinion evidence**

14 Plaintiff argues the ALJ improperly weighed the opinion evidence, by
15 insufficiently rejecting Dr. Bulfinch and Dr. Crank, and misinterpreting Dr. Platter.
16 ECF No. 13 at 16-19.

17 In weighing medical source opinions, the ALJ should distinguish between
18 three different types of physicians: (1) treating physicians, who actually treat the
19 claimant; (2) examining physicians, who examine but do not treat the claimant; and
20 (3) nonexamining physicians who neither treat nor examine the claimant. *Lester*,
21 81 F.3d at 830. The ALJ should generally give more weight to the opinion of a
22 treating physician than to the opinion of an examining physician, and more weight
23 to an examining source than a non-examining source. *Orn v. Astrue*, 495 F.3d 625,
24 631 (9th Cir. 2007). In evaluating the weight owed to opinions, the ALJ should
25 consider the nature of the relationship, the supportability and consistency of the
26 opinion, any specialization of the source, and other factors, such as the
27 understanding of the disability programs and the source's familiarity with the case
28 record. 20 C.F.R. § 416.927(c).

1 When a treating or examining physician's opinion is contradicted by another
2 physician, the ALJ is required to provide "specific and legitimate reasons," based
3 on substantial evidence, to reject the opinion. *Andrews v. Shalala*, 53 F.3d 1035,
4 1041 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The
5 specific and legitimate standard can be met by the ALJ setting out a detailed and
6 thorough summary of the facts and conflicting clinical evidence, stating his
7 interpretation thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747,
8 751 (9th Cir. 1989). The ALJ is required to do more than offer his conclusions, he
9 "must set forth his interpretations and explain why they, rather than the doctors',
10 are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

11 The Commissioner may reject the opinion of a non-examining physician by
12 reference to specific evidence in the medical record. *Sousa v. Callahan*, 143 F.3d
13 1240, 1244 (9th Cir. 1998).

14 ***a. Dr. Bulfinch, treating doctor***

15 Plaintiff's treating physician, Dr. Charles Bulfinch, completed two medical
16 source statements in support of Plaintiff's claim. In 2017, following their first
17 appointment, Dr. Bulfinch noted Plaintiff's diagnoses of shoulder pain, knee pain,
18 and dyspnea on exertion. Tr. 316. He noted he had made several referrals, and
19 further treatment was needed, but that Plaintiff would be likely to miss one day of
20 work per month, noting if he strained his shoulder, he might need a day off. Tr.
21 317. Dr. Bulfinch said Plaintiff's prognosis was excellent, and there were no
22 limitations at that time. *Id.* In 2018, Dr. Bulfinch opined Plaintiff's mild lumbar
23 facet arthrosis and patellofemoral knee pain were expected to cause mild
24 intermittent pain, and that his prognosis was good. Tr. 399-400. He stated Plaintiff
25 would likely miss two days of work per month due to flares in his pain, and noted
26 Plaintiff reported more pain than would be expected from his imaging results and
27 physical exam findings. Tr. 400.

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1 The ALJ gave each of these opinions less weight, noting them to be
2 speculative, insufficiently supported, and inconsistent with the longitudinal record.
3 Tr. 21. Specifically, the ALJ found the opinions regarding missed days to be
4 inconsistent with the good prognosis, and based solely on Plaintiff's subjective
5 reports. *Id.* He further noted the opinions to be inconsistent with the longitudinal
6 record showing generally normal presentation at appointments, and found them
7 inconsistent with Plaintiff's documented activities. *Id.*

8 Plaintiff argues that while the ALJ's comments regarding inconsistency and
9 speculation may have applied to the first opinion, by the time Dr. Bulfinch
10 completed the 2018 opinion he had a longer treatment relationship with Plaintiff
11 and had reviewed records from other consultants. ECF No. 13 at 17-18. He further
12 asserts that the same arguments regarding the longitudinal record and Plaintiff's
13 activities as were made with respect to the subjective allegations portion of the
14 decision apply equally to Dr. Bulfinch. *Id.* Defendant argues the ALJ's reasoning is
15 rational and supported by substantial evidence. ECF No. 14 at 15-19.

16 The Court finds the ALJ did not err. An ALJ may reasonably consider the
17 consistency of a medical opinion with the source's own records, and with the
18 record as a whole. *Molina v. Astrue*, 674 F.3d 1104, 1111-12 (9th Cir. 2012);
19 *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir. 2009).
20 The ALJ reasonably interpreted Dr. Bulfinch's opinions regarding missed days as
21 inconsistent with his records, which contained little objective basis for ongoing
22 impairment. Furthermore, a doctor's opinion may be discounted if it is "based to a
23 large extent on a claimant's self-reports that have been properly discounted as
24 incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). The ALJ
25 reasonably found Plaintiff's allegations to be unreliable, and Dr. Bulfinch himself
26 noted Plaintiff's pain reports exceeded what would be expected based on imaging
27 and exam findings. Tr. 400. As the missed days limitation in the 2018 opinion was

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1 based on possible flares of pain, the ALJ reasonably interpreted this as based on
2 Plaintiff's subjective reports.

3 The ALJ therefore offered specific and legitimate reasons for discounting
4 Dr. Bulfinch's opinions.

5 ***b. Dr. Crank, examining doctor***

6 In December 2016 Plaintiff was examined by Dr. Jeremiah Crank, who
7 completed paperwork for the state Department of Social and Health Services. Tr.
8 413-15. Dr. Crank opined Plaintiff was limited to sedentary work and had marked
9 impairment in most physical work-related functions, due to his neck pain and knee
10 pain. Tr. 414-15.

11 The ALJ gave this opinion less weight, finding it to be inconsistent with the
12 minimal findings on Dr. Crank's own exam, and inconsistent with the overall
13 record containing mostly unremarkable imaging and exam findings and Plaintiff's
14 activities. Tr. 21-22.

15 Plaintiff argues the ALJ did not explain why Dr. Crank's exam findings
16 were insufficient to support the limitation to sedentary work, noting the range of
17 motion findings and tenderness observed on exam were supportive of limits. ECF
18 No. 13 at 19. He also reiterated the same arguments regarding the longitudinal
19 record and activities. *Id.* Defendant argues the ALJ's interpretation was reasonable,
20 as the findings were minimal and the overall record shows largely unremarkable
21 findings. ECF No. 14 at 19-20.

22 The Court finds the ALJ did not err. An opinion's consistency with the
23 record as a whole is a relevant factor for the ALJ to consider. 20 C.F.R. §
24 416.927(c)(4). "When the evidence is susceptible to more than one rational
25 interpretation, we must uphold the ALJ's findings if they are supported by
26 inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104,
27 1111 (9th Cir. 2012). The ALJ reasonably pointed to the unremarkable imaging
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1 and exam findings throughout the record in finding Plaintiff was not as limited as
2 Dr. Crank found.

3 ***c. Dr. Platter, reviewing doctor***

4 Dr. Howard Platter reviewed Plaintiff's file for the reconsideration stage of
5 adjudication. Tr. 99-109. He concluded Plaintiff was capable of lifting or carrying
6 50 pounds occasionally and 25 pounds frequently, and standing or walking and
7 sitting for six hours in a workday. Tr. 105-06. He further found that, due to knee
8 pain and decreased shoulder movement, Plaintiff should avoid ladders, ropes, and
9 scaffolds, and was limited to frequent ramps and stairs, balancing, stooping,
10 kneeling, crouching, and crawling. Tr. 106.

11 The ALJ gave this opinion the most weight, finding it most consistent with
12 the record, but indicated that he was finding Plaintiff more restricted than Dr.
13 Platter did, characterizing the opinion as "a range of heavy work." Tr. 20-21.

14 Plaintiff argues that the ALJ mischaracterized Dr. Platter's opinion as
15 "heavy" when it was really "medium" and that this fundamental mishandling of the
16 opinion to which the ALJ assigned the most weight undercuts the ALJ's entire
17 reasoning. ECF No. 13 at 16-17. Plaintiff also notes that the ALJ gave no reasons
18 for not adopting the postural limitations opined by Dr. Platter. *Id.* Defendant argues
19 that the opinion could qualify as medium or heavy, and the exclusion of the
20 postural limitations was harmless at most. ECF No. 14 at 11-15.

21 The Court finds no error. Dr. Platter's assessed RFC was for medium work.
22 Tr. 105 ("Medical evidence and ADLs indicate claimant remains capable of doing
23 medium work"); 20 C.F.R. § 416.967(c)(defining medium work as involving
24 lifting no more than 50 pounds at a time with frequent lifting or carrying of objects
25 weighing up to 25 pounds"). However, the ALJ's characterization of the opinion as
26 recommending "heavy" work is harmless. The ALJ adopted the exertional
27 limitations recommended by Dr. Platter, and included more limits on reaching. As
28 Defendant points out, the exclusion of the recommended postural limitations was

1 harmless, as none of the jobs identified at step five require postural movements in
2 excess of those recommended by Dr. Platter. ECF No. 14 at 14-15. *Tommasetti v.*
3 *Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is harmless when “it is clear
4 from the record that the . . . error was inconsequential to the ultimate nondisability
5 determination”).

6 **CONCLUSION**

7 Having reviewed the record and the ALJ’s findings, the Court finds the
8 ALJ’s decision is supported by substantial evidence and free of legal error.

9 Therefore, **IT IS HEREBY ORDERED:**

10 1. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is
11 **GRANTED.**

12 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is **DENIED.**

13 The District Court Executive is directed to file this Order and provide a copy
14 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
15 and the file shall be **CLOSED.**

16 **IT IS SO ORDERED.**

17 DATED September 8, 2020.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE